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## CITATIONS


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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

HARRY WILLIAM BROWN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

### INTRODUCTION

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Virginia entered in the above-entitled case on the 18th day of October, 1974, petition for rehearing denied on December 5, 1974.

Harry William Brown, Petitioner, was the Defendant in the Trial Court, and hereinafter will either be referred to as "Brown" or "Defendant". The Respondent, the Commonwealth of Virginia, will hereinafter be referred to as "Commonwealth". All references to the Transcript will be designated (Tr. ____). All references to the Transcript of the Motion to Set Aside the Verdict will be designated (Tr. Motion to Set Aside Verdict ____).

## OPINION BELOW

The order of the Court below, without opinion, was dated December 5, 1974, and stated as follows:

> "On mature consideration of the Petition of the Plaintiff in error to set aside the judgment rendered herein (Case A - Indictment No. 173-17, 315) on the 18th day of October, 1974, and grant a rehearing thereof, the prayer of the said Petitioner is denied."

## JURISDICTION

The Final Order of the Supreme Court of Virginia was made and entered on the 5th day of December, 1974. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

## QUESTION PRESENTED

Where evidence was produced which showed that an exhibit, in the exclusive possession of the Commonwealth during the trial, had been materially altered and changed, did the Supreme Court of Virginia violate the Defendant's right of Due Process in denying a Writ of Error to review the refusal of the Lower Court to rule on said alteration?

## STATEMENT OF THE CASE

The Defendant was tried before a jury in a two-day trial on January 30-31, 1974, upon two charges (hereinafter referred to as Case A and Case B) alleging that he did unlawfully and feloniously distribute a controlled substance, to-wit: a quantity of heroin, a Schedule I

controlled substance, in violation of *Code of Virginia* (1950), §54-524.101:1(a), on July 3, 1973 and July 26, 1973, in the City of Martinsville, Virginia. The charge which allegedly occurred on July 3, 1973, and which is the subject of this Petition, will hereinafter be referred to as Case A; the charge which allegedly occurred on July 26, 1973, will hereinafter be referred to as Case B.

The main witness for the Commonwealth, George Lincoln Hopkins, Jr. (hereinafter referred to as "Hopkins"), testified that on July 2, 1973, he rented a motel room in Henry County, Virginia, for the purpose of selling various drugs from that location. According to Hopkins' testimony he contacted the Defendant in order to obtain additional heroin, which was to be sold by Hopkins and a portion of the proceeds to be returned to the Defendant (Tr. 6). The heroin was allegedly actually delivered to Hopkins by the Defendant on the afternoon of July 3, 1973 (Tr. 6). Early in the morning of July 4, 1973, officers from the Henry County Sheriff's Office and the Martinsville Police Department raided the motel and later discovered 29 foil packets containing a white substance, later proven to be heroin (Tr. 50-54). The foil wrapped packages of heroin were sent to the Division of Consolidated Laboratory Services for possible fingerprint identification (Tr. 49). It was found there that several prints on the foil were identifiable as those of the Defendant. (Tr. 65, 78).

When the Defendant took the stand, he, in an effort to explain the presence of his fingerprints, testified that Hopkins had come to his house on June 29, 1973, to try to sell him a pistol. On that occasion the pistol had been wrapped in tin foil and the Defendant had touched the tin foil on the pistol (Tr. 151-52, 185-86). During the

trial, the Attorney for the Commonwealth handed a pistol to the Defendant and a box of tin foil and asked the Defendant to wrap the weapon as the one had been wrapped when Hopkins had handed it to him (Tr. 195-98). The Defendant loosely wrapped tin foil around the gun (Tr. of Motion to Set Aside the Verdict, pp. 15, 21-26, 30-34, 38-40).

The Commonwealth's Attorney then made extensive references in his rebuttal to the fact that foil in such a wrinkled condition could not have been used to package the heroin, and even if it could have been flattened out, latent fingerprints could not remain thereon. (Tr. of Motion to Set Aside Verdict, p. 17).

After the jury returned a verdict of guilty on both Case A and Case B and fixed his punishment at a five year sentence and a $2,500.00 fine on each case (Tr. 240), and Final Judgment Order was entered against the Defendant on the 31st day of January, 1974, it came to the attention of counsel for the Defendant that sometime between the cross-examination of the Defendant and the rebuttal to the Defendant's closing argument, the pistol and foil had been altered, in that the foil was then tightly compressed and wrinkled against the outline of the pistol (Tr. of Motion to Set Aside Verdict, pp. 23-26, 31-32, 34, 39-40, 45), which had the effect of enhancing the argument of the Commonwealth's Attorney.

Upon discovery of the alteration of said exhibit, counsel for the Defendant, on February 21, 1974, moved to set aside the verdict on the ground that such a material alteration of an exhibit in the exclusive possession of the Commonwealth would be a violation of the Defendant's right to a fair trial and, therefore, violative of due process of law (Tr. of Motion to Set Aside Verdict, pp. 3-4).

In support of said motion, counsel for the Defendant produced testimony by several witnesses, to the effect that the condition of the gun and tin foil had changed drastically between the time of the cross-examination of the Defendant and the rebuttal argument of the Commonwealth's Attorney, while the exhibits had been in the exclusive possession of the Commonwealth.

Said motion was overruled by the Trial Court without deciding whether, in fact, the exhibited articles were altered while in the exclusive possession of the Commonwealth. The Trial Court stated: ". . . this is something that took place during the trial, whether it was altered or not, I'm not going to get into that part." (Tr. 53). Therefore, despite testimony by competent observers, the Trial Court failed even to rule on the issue in question.

## REASONS FOR GRANTING THE WRIT

The failure of the Trial Court to decide whether or not the exhibit had in fact been altered, as the witnesses in the hearing on the Motion to Set Aside the Verdict testified, was an abuse of discretion and a clear violation of the Defendant's right to a fair trial, as guaranteed by the *Due Process Clause* of the *Fourteenth Amendment* to the *United States Constitution.* If the exhibit had been altered or changed from its original condition, then it is respectfully submitted that such would constitute a violation of the Defendant's rights to a fair trial. It is further submitted that the refusal by the Supreme Court of Virginia to rule on said refusal, would also be a violation of the Defendant's rights.

Although there was ample testimony by competent witnesses that the condition of the foil had changed

drastically while in the possession of the Commonwealth, it is not the purpose of this Petition to assert that such was the case. Rather, the failure of the Trial Court even to decide whether or not the exhibit was actually altered or changed is the point in issue herein. Clearly, the decision of the Trial Court and the Supreme Court of Virginia should have been based on whether, in fact, the exhibited articles were altered while in the exclusive possession of the Commonwealth. If the Trial Court had then found that the exhibits had not been altered, then it is admitted that there would have been no basis for sustaining the Motion to Set Aside the Verdict. However, if the Trial Court had found that there had in fact been a material alteration, whether intentional or not, then certainly the Defendant's rights under the *Fourteenth Amendment* of the *United States Constitution* would have been violated and a new trial should have been granted. Despite the fact that evidence was produced at the hearing on the Motion to Set Aside the Verdict that someone, who had access to the gun and tin foil which were in the exclusive possession of the Commonwealth, had materially changed the condition of the articles, the trial court refused to rule thereon. The failure of the Supreme Court to review the lower Court's decision was an abuse of discretion and a clear violation of the Defendant's guaranteed right to a fair trial.

It is clear that the prosecution's knowing use of false evidence violates a criminal defendant's rights under the *Fourteenth Amendment* to the *United States Constitution*. The leading case in this regard is *Miller* v. *Pate*, 386 U. S. 1 (1967). In *Miller*, the prosecution had introduced into evidence in the prosecution of a brutal sexual assault-murder of an eight year old girl, a pair of undershorts which were purportedly stained with blood of the same

type as the victim, a different type from that of the defendant. The shorts formed a crucial part of the prosecution's case. When the shorts were later examined by an expert at a post-conviction hearing, it was revealed that the stains were paint and not blood. The prosecution conceded this, but attempted to point out that the shorts were introduced into evidence for the jury to examine and that the nature of the stains could be determined by observation. However, the expert who discovered the paint stains indicated that the nature of the stains would be almost impossible to ascertain without chemical analysis. The Court stated at page 7:

> "More than 30 years ago this Court held that the *Fourteenth Amendment* cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. There has been no deviation from that established principle. *Napue* v. *People of State of Illinois,* 360 U. S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; *Pyle* v. *State of Kansas,* 317 U. S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Cf., Alcorta* v. *State of Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9. There can be no retreat from that principle here."

An analagous situation arises in the knowing use of false testimony by a witness. In *Rhinehart* v. *Rhay,* 440 F. 2d 718, 723 (1971), the following quote appears:

> "It is clear that the state may not use the false testimony of a witness where the prosecutor or other representative of the state knows the testimony to be false. This principle applies equally where the testimony is unsolicited by the state but allowed to go uncorrected. It makes no dif-

> ference whether the false testimony goes to substantive aspects of the offense, the credibility of the witness, or the ultimate punishment of the accused. Finally, the defense need not show that the true state of the facts would necessarily have resulted in an acquittal since '(t)he false testimony used by the state in securing the conviction * * * may have had an effect on the outcome of the trial.' "

While it must be conceded that there was no proof offered by the defense that the alteration of the exhibits was done knowingly by the Commonwealth, the mere use of said objects against the Defendant would be a violation of due process of law. During the entire course of the trial, the articles were in the exclusive possession of the Commonwealth. Whether the change was done knowingly or unwillingly is immaterial, because the prosecution owed to the Defendant the right to have exhibits shown to the jury unchanged.

Here, the Trial Court did not even see fit to decide whether or not the exhibit had in fact been altered. Failure of the Trial Court to decide whether an alteration had occurred, after evidence had been presented to that effect, and failure of the Supreme Court of Virginia to review said decision represent a breach in the right of the Defendant to a fair and impartial trial, as guaranteed by the *Fourteenth Amendment* to the *United States Constitution.*

The duty of this Court to make its own independent examination of the record when Federal Constitutional deprivations are alleged is clear, resting as it does on its solemn responsibility for maintaining the Constitution

inviolate. *Martin* v. *Hunter's Lessee,* I Wheat. 304, 4 L.Ed. 97; *Cooper* v. *Aaron,* 358 U.S. 1, 78 S. Ct. 1401, 3 L.Ed 2d 5. This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

HARRY WILLIAM BROWN

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## CERTIFICATE

I, R. Reid Young, Jr., of Young, Kiser, Haskins & Mann, Ltd., 60 West Church Street, Martinsville, Virginia, 24112, do hereby certify that on or before the day this Petitioner's Brief was filed with the Clerk of the Supreme Court of the United States, I mailed three (3) copies of the said Brief to Andrew P. Miller, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219, and John J. Hartley, Commonwealth's Attorney for the City of Martinsville, 2-1/2 East Main Street, Martinsville, Virginia, 24112, counsel of record for the Respondent.

R. REID YOUNG, JR.
Of Counsel for Petitioner